UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1498 -- August Term 1992

(Argued May 3, 1993 Decided *Feb 24, 1994*)

Docket No. 93-6019

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ORGANIZACION JD LTDA., and MANUFACTURAS JD, LTDA.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; DRUG ENFORCEMENT ADMINISTRATION OF THE UNITED STATES OF AMERICA; BANCO ATLANTICO, S.A.; THE BANK OF NEW YORK,

Defendants-Appellees.

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B e f o r e : MESKILL, WALKER,[1]

Circuit Judges, and

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[1] The Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, sitting by designation.

MOTLEY, District Judge.

Plaintiffs brought a civil damages action alleging statutory and constitutional violations arising out of governmental seizure of numerous electronic fund transfers alleged to involve proceeds from illicit drug trafficking. The United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge) dismissed the complaint in its entirety.

Affirmed in part, vacated in part, and remanded.

ISIDORO RODRIGUEZ, Barranquilla, Columbia S.A., for Plaintiffs-Appellants.

GARY R. BROWN, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Varuni Nelson, Jennifer C. Boal, Arthur P. Hui, Assistant

United States Attorneys, of counsel), for Defendants-Appellees U.S. Department of Justice and Drug Enforcement Administration of the United States of America.

MARK SULLIVAN, New York, New York (Townley & Updike, of counsel), for Defendant-Appellee Banco Atlantico, S.A.

MICHAEL D. POVMAN, New York, New York, for Defendant-Appellee the Bank of New York.

Per Curiam:

The facts of this case have been set forth thoroughly in a related appeal previously decided by a panel of this court, familiarity with which is assumed. See United States v. Daccarett, 6 F.3d 37 (2nd Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Nov. 15, 1993) (No. 93-1020). Daccarett centered around the 1990 government seizure of numerous electronic fund transfers ("EFTs")

alleged to involve the proceeds of illicit drug trafficking, totalling over $12 million. After a two-month trial, a jury found eighteen of twenty-two seized amounts forfeitable. Notably, the jury found that the amounts claimed by the appellants in this case, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda, were not traceable proceeds of illegal money-laundering and narcotics transactions. See United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984, 993 (E.D.N.Y. 1992) (Weinstein, J.) ("All Funds") (affirmed by Daccarett, supra).

The intended recipients of these various money transfers did not sit by quietly when their funds were seized. These parties sued the intermediary

banks for violations of various federal and state statutes. The district court granted summary judgement for the banks, holding that they could not be held liable for following governmental orders respecting claimed governmental funds. See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. 180 (E.D.N.Y 1992) (Weinstein, J.). In another action, various recipients sued the government attorneys who had ordered the banks to seize the funds; the same district judge dismissed this complaint for failure to state a claim. See Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

Plaintiffs in this case are two of the appellants from the Daccarett case, which affirmed the district court's

rulings in the All Funds case. Before trial in the All Funds case, plaintiffs brought a six-count civil complaint against two government agencies and two private banks charging them with statutory and constitutional violations arising from the seizures of the EFTs. Prior to the jury trial in the underlying All Funds case, the district court (Jack B. Weinstein, Judge) granted the defendants' motion to dismiss the plaintiffs' complaint, stating from the bench that its ruling was based on the reasons stated in its two earlier decisions in Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., supra, and United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, No. CV 90-2510, 1992 U.S. Dist. LEXIS

1881 (E.D.N.Y. Feb. 19, 1992) (a pretrial ruling denying the claimants' motions to vacate the district court's earlier finding of probable cause for the seizures and refusal to suppress certain evidence). Plaintiffs now appeal.

In Daccarett, this court comprehensively explored the legal issues surrounding the All Funds seizures and affirmed the rulings of the district court. Consequently, our discussion of the issues raised by this appeal is brief. For the reasons stated below, we affirm in part the dismissal of the complaint and remand for further proceedings consistent with this opinion.

The Civil Complaint

Counts One and Six of the plaintiffs' civil complaint allege violations of the Fourth and Fifth Amendments of the United States Constitution. This court in Daccarett affirmed the district court's ruling that the seizures did not violate the Fourth Amendment of the Constitution, See Daccarett, 6 F.3d at 49, and that ruling controls here.

Although Daccarett did not discuss the Fifth Amendment, the Supreme Court's latest pronouncement in this area makes it clear that civil forfeitures can violate the Fifth Amendment as well. See United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499-500 (1993). In James Daniel Good, the Court considered whether, in the absence of exigent circumstances, the Fifth

Amendment prohibited the government in a civil forfeiture case from seizing assets without first providing notice and an opportunity to be heard. The Court held that the Fifth Amendment was implicated in civil forfeitures. Id. at 500. Analyzing the civil forfeiture procedure under the three-pronged balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), the Court ruled that absent exigent circumstances, the government cannot seize an individual's real property via the civil forfeiture mechanism without providing predeprivation notice and an opportunity to be heard. Id. at 501-05.

Because James Daniel Good involved real property, the Court did not address whether personal property is similarly protected by the Fifth Amendment. We

need not decide this issue here, however, because the seizures in this matter plainly involved exigent circumstances, and the James Daniel Good Court made clear that seizures involving exigent circumstances are exempted from predeprivation notice and hearing requirements. Id. at 500. As the Daccarett court reasoned, "[b]ecause the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here." Daccarett, 6 F.3d at 49. Thus, the plaintiffs can claim no Fifth Amendment violation.

Count Two of the complaint alleged two distinct violations of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 et

seq., which govern interception of wire electronic communications, and §§ 2701 et seq., which govern access to certain stored electronic records. First, plaintiffs claim that they are entitled to civil damages under § 2520 for the alleged unlawful "interception" of the EFTs. However, the Daccarett court ruled that the seizures did not constitute "interceptions" under the ECPA because no "device" was used, as required under 18 U.S.C. § 2510(4). See Daccarett, 6 F.3d at 54. Because no "interceptions" occurred, plaintiffs have no cause of action under § 2520.

Second, plaintiffs claim they are entitled to civil damages under § 2707(a), which provides a civil cause of action for the unlawful access to stored communications in violation of § 2701.

The statute states:

> (a) Cause of action. -- Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or international state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C § 2707(a). We agree with the district court that the defendant banks cannot be held civilly liable under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(d) (1). See Manufacturas Int'l, Ltda v.

Manufacturers Hanover Trust Co., 792 F. Supp. at 192-93.

However, the government agencies' potential liability under § 2707 is a different matter. Few courts have addressed the complex issues surrounding the government's possible liability under § 2707(a). We note that the district court's two decisions upon which it relied when ruling from the bench to dismiss the plaintiffs' complaint had no occasion to discuss the government's liability under § 2707(a).

As an initial matter, we address whether a governmental entity can be held civilly liable under § 2707(a). To our knowledge, only two district courts have discussed this question, both of which suggested that a governmental "entity" may be liable under § 2707.

See PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 823 (D.N.J. 1993); Bodunde v. Parizek, No. 93-C-1464, 1993 U.S. Dist. LEXIS 7365 (N.D. Ill. May 27, 1993). Those courts concluded that prior to the 1986 enactment of the ECPA, the definition of "person" in § 2510(6) already included business entities such as corporations and partnerships, and that in order to give full meaning to the new statutory language, "entity" must be taken to mean governmental entity. They have found support for this conclusion in legislative history that specifically references "governmental entities" as potentially liable under § 2707(a). See S. Rep. No. 541, 99th Cong., 2d Sess.43 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3597 (stating that an aggrieved

party "may recover from any person or entity -- including governmental entities -- who knowingly or intentionally violated this chapter"). We find the analyses of these courts persuasive and hold that governmental "entities" are subject to liability under § 2707(a).

Apart from this determination, two issues remain: whether the particular plaintiffs in this case are able to bring an action under § 2707(a), and whether the government agents impermissibly violated the ECPA. Because the resolution of these issues requires a more complete factual record, we remand the § 2707(a) claim under Count Two against the government defendants for an initial determination by the district court.

We offer several observations for the benefit of the district court on remand. First, § 2707(a) confines those who may recover damages to "any provider of electronic communication service, subscriber, or customer aggrieved." Plaintiffs here were to be ultimate beneficiaries of sequential electronic fund transfers. Whether plaintiffs fit within the class of individuals who may bring suit under § 2707(a) is an open question that might well turn on the issue of whether the term "customer" applies to the plaintiffs in the factual circumstances presented here.

Second, if the district court should find that plaintiffs fit within the class of "any provider of electronic communication service, subscriber, or customer aggrieved" under § 2707, a

matter as to which we express no opinion, then the court must decide whether the governmental agents in this case complied with the ECPA, or were somehow excused from doing so. Section 2703 of the ECPA lays out the requirements for governmental access to an electronic communication, satisfaction of which would avoid liability under § 2707(a). Because we believe the district court is in the best position to consider these questions and make appropriate findings of fact in the first instance on remand, we take no position on the merits of this aspect of plaintiffs' § 2707(a) claim against the government.

Counts Three and Four of the complaint alleged breach of contract claims against the defendant banks.

Plaintiffs claim that by failing to forward the wire transfers, the intermediary banks failed to follow the wire transfer rules and regulations of the Federal Reserve System and the Clearing House Interbank Payment System, and that this "breach of contract" caused them damage. In essence, the plaintiffs claim third-party beneficiary status to the contract between the intermediary banks and the wire transfer systems.

Irrespective of whether the plaintiffs can even make out a claim as a third-party beneficiary under New York law, the private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforceable contract

impossible to perform. See, e.g., RSB Mfg. Corp. v. Bank of Baroda, 15 B.R. 650 (S.D.N.Y. 1981) ("The defense of impossibility extends to judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action."); Hamilton Rubber Mfg. Co. v. Greater N.Y. Carpet House, Inc., 47 N.Y.S.2d 210, 211 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 681, 53 N.Y.S.2d 954 (1st Dep't 1945); Restatement (Second) of Contracts § 264 (1981). Accordingly, Counts Three and Four were properly dismissed.

Finally, Count Five of the complaint alleged violations of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq. However, as this court explained in Daccarett, the RFPA was "meant to protect those who

maintain accounts in their names at financial institutions," and because the plaintiffs "never maintained accounts in their names at the intermediary banks," there was no violation of the RFPA. 6 F.3d at 51-52 (emphasis in original). Thus, the RFPA provides no basis for relief and Count Five, too, was properly dismissed.

Conclusion

For the foregoing reasons, we affirm the dismissal of the civil complaint on Counts One, Three, Four, Five, and Six, and Count Two in part. We vacate and remand that part of Count Two which alleged a claim for civil damages against the government under § 2707(a) for further proceedings consistent with this opinion.

Parties to bear their own costs.

APPENDIX-B

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

CHAPTER 119-WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS . . . 1

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CHAPTER 119-WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

18 U.S.C. § 2510. Definitions:

(4) "intercept" means the . . . acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .;

(11) "aggrieved person" means a person who was a party to any intercepted . . . electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of . . . intelligence of any nature transmitted in whole or in part by wire . . . that affects interstate or foreign commerce, ...;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication;

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . . .

18 U.S.C. § 2511(1)(a) and (c). Interception and disclosure of . . . electronic communications prohibited:

Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , or procures any other person to intercept . . . , any . . . electronic communication;

(c) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished as in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(2)(a)(i):

. . . a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

18 U.S.C. § 2511(3)(a):

Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any

communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3). Authorization for interception of . . . electronic communications:

Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2518(7). Procedures for interception of . . . electronic communications:

Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, especially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute or

that State, who reasonably determines that-

(a) an emergency situation exists that involves-

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interests, or

(iii) conspiratorial activities characteristic of organized crime.

that requires . . . electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such . . . electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for approval is denied, or in any other case earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any . . . electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

18 U.S.C. § 2518(9):

The contents of any . . . electronic communication intercepted pursuant to this chapter or evidence derived there from shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal of State court unless each party, not less than ten days before trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. . . .

18 U.S.C. § 2518(10)(c):

The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for non-constitutional violations of this chapter involving such communications.

18 U.S.C. § 2520. Recovery of civil damages authorized:

(a) In general.-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

(b) Relief.-In a civil action under this section, appropriate relief includes-

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and,

(3) a reasonable attorney's fee and other litigation costs reasonable incurred.

(d) **Defense.**-A good faith reliance on-

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

CHAPTER 121-STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

18 U.S.C. § 2701. Unlawful access to stored communications

(a) **Offense.**-Except as provided in subsection (c) of this section whoever-

(1) intentionally accesses without authorization a facility through which an

electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility; and thereby obtains . . . electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(c) **Exception.**-Subsection (a) of this section does not apply with respect to conduct authorized-

(1) by the person or entity providing a . . . electronic communications service;

(2) by a user of that service with respect to a communication or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

18 U.S.C. § 2702. **Disclosure of contents:**

(a) **Prohibitions.**- Except as provided in subsection (b)-

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

(b) **Exceptions.**-A person or entity may divulge the contents of a communication-

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2603 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, . . .

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessary incident to the rendition of the service or to the protection of the rights of property of the provider of that service; or

(6) to a law enforcement agency, is such contents-

(A) were inadvertently obtained by the service provider; and

(B) appear to pertain to the commission of a crime.

18 U.S.C. § 2703. **Requirements of government access**

(a) **Contents of electronic communications in electronic storage.-** A Government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more

than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of electronic communications in a remote computing service.-

(1) A government entity may require a provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this section-

(A) without required notice to the subscriber or customer, if the government entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or

(B) with prior notice from the government entity to the subscriber or customer if the government entity-

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2)Paragraph (1) is applicable with respect to any electronic communication that is held or maintained on that service-

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing

of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and,

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communication for purposes of providing any service other than storage or computer processing.

(c) **Records concerning electronic service . . . .**

(B) A provider of electronic communication service . . . shall disclose a record or other information pertaining to a . . . customer of such service (not including the contents of communications covered by subsection (a)(b) of this section) to a government entity only when the government entity-

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena;

(ii) obtains a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant;

(iii) obtains a court order for such disclosure under subsection (d) of this section; or

(iv) has the consent of the . . . customer to such disclosure.

(e) **No cause of action against a provider disclosing information under this chapter.**-No cause of action shall lie in any court against any provider of

. . . electronic communication service, its officer, employee, agents, or other specified persons for providing information, facilities, or assistance with the terms of a court order, warrant, subpoena, or certification under this chapter.

18 U.S.C. § 2707. **Cause of action**

(a) **Cause of action**- Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) **Relief.**-In a civil action under this section, appropriate relief includes-

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and,

(3) a reasonable attorney's fee and other litigation costs reasonable incurred.

(d) **Defense.**-A good faith reliance on-

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law

18 U.S.C. § 2711. **Definitions for chapter**

As used in this chapter-

(1) the terms defined in section 2510 of this title have, respectively, the definitions given in that section.